

**BEFORE THE ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION
FOR THE STATE OF CALIFORNIA**

**APPLICATION FOR CERTIFICATION OF THE
LOS ESTEROS CRITICAL ENERGY
FACILITY (Los ESTEROS)**

DOCKET No. 01-AFC-12
APPLICATION COMPLETE
SEPTEMBER 25, 2001

**I. COMMITTEE RULING ON APPLICANT'S PETITION
FOR EXPEDITED REVIEW**

On March 1, 2002, Applicant filed what we have denominated as a Petition for Expedited Review (Petition), which requests the Committee to:

- (a) Issue a Committee Schedule that allows for a Final Commission Decision on the Application for Certification (AFC) no later than April 17, 2002;
- (b) Authorize certain pre-construction activities that are enumerated in the Petition as follows:
 - Mobilize Construction Trailers – this activity involves leveling an approximately 5 to 7 acre area, placing gravel over the area for dust and mud control, moving and parking construction trailers onto the site and obtaining power and telephone service including the installation of approximately two 25 foot power poles;
 - Establish Parking Area – the activity involves leveling an approximately 5 acre area, placing gravel to control dust and mud, establishing best management practices for erosion control as described by the construction Storm Water Pollution Prevention Plan (hay bales, silt fences, wattles, etc);
 - Establish Construction Laydown – this activity involves leveling an approximately 10-15 acre area, placing gravel to control dust and mud, establishing best management practices for erosion control as described by the construction Storm Water Pollution Prevention Plan (hay bales, silt fences, etc), and staging plant equipment and construction materials, and parking construction equipment;¹

¹ Applicant's Petition requests that the following pre-construction activities commence after any approval of the PMPD.

- Excavate power block and cooling tower foundations;
- Excavate underground utility trench;
- Set conduit in underground utility trench;
- Set reinforcing steel bars in power block and cooling tower foundations; and
- Set forms around power block and cooling tower foundations.

For the reasons set forth below, the Petition is ***DENIED***.

Energy Commission Decision

For the Energy Commission to issue a Final Decision on the AFC at its Business Meeting on April 17, 2002, would require, at the very latest, this Committee to issue its Presiding Member's Proposed Decision (PMPD) by Friday, March 15, 2002.² March 11 is the beginning of Evidentiary Hearings where there are three active Intervenors, including the City of Milpitas and a Coalition of Environmental Groups, contesting 12 separate topic areas. Even with the assumption of a one-day hearing lasting into the evening hours, expedited transcripts of a lengthy hearing may not be produced until March 15, 2002. Thus, Applicant's Petition would require the Committee to issue a PMPD on virtually the identical day it receives the written transcript of the Evidentiary Hearing. Obviously, this is not possible.

Moreover, Applicant bases its Petition on the "obligations to the Department of Water Resources [DWR] to have all units in commercial operation by October 1, 2002." (Petition, p. 2.) The Energy Commission is not a party to the foregoing DWR contract, nor are we aware of any third-party obligation relative to such a contract. Instead, as Applicant correctly notes, the Energy Commission's mandate in this proceeding lies in the statutory licensing procedure under which Applicant filed its AFC. (Pub. Resources Code § 25552.) Section 25552's requirements, *inter alia*, is a finding that Applicant's AFC can be put into service on or before December 31, 2002.³

The Committee is sensitive to and concerned about the importance Applicant attaches to its contractual deadline with DWR. However, this Committee's primary focus must be to ensure that the siting process for this project conforms with all applicable laws and regulations, and that the public, Intervenors, and governmental agencies participating in this proceeding are afforded an adequate and legally appropriate opportunity to participate in the review of the project. Accordingly, Applicant's request for this

² Because the California Environmental Quality Act (CEQA) requires a 30-day notice period, Monday, April 15 would be the first business day that the Energy Commission could act to approve any favorable PMPD. Applicant has not brought to our attention any authority--nor are we aware of any--that would allow the Energy Commission to waive the 30-day comment period.

³ In this regard, we note parenthetically that Applicant stated at the Informational Hearing that it would take five months to construct the LECEF using "quite a bit of off site prefabrication....It doesn't include pre-construction on the site, though." (11/09/01 RT 45:17-46-19.)

Committee to issue a Schedule allowing for an Energy Commission Decision on the AFC by April 17, 2002 is ***DENIED***.

Preconstruction Activities

Under current statutory authority contained in the Warren-Alquist Act (the Act), "no construction of any facility or modification of any existing facility shall be commenced without first obtaining certification for any such site and related facility by the commission." (Pub. Resources Code § 25500 et seq.) In addition, the Act defines construction as follows:

"Construction" means onsite work to install permanent equipment or structure for any facility. "Construction" does not include any of the following:

The installation of environmental monitoring equipment.

- (a) A soil or geological investigation.
 - (b) A topographical survey.
 - (c) Any other study or investigation to determine the environmental acceptability or feasibility of the use of the site for any particular facility.
 - (d) Any work to provide access to a site for any of the purposes specified in subdivision (a), (b), (c), or (d).
- (Pub. Res. Code § 25105.)

Applicant's Petition involves groundbreaking activities not included within any reasonable interpretation of the Act. Accordingly, Applicant's request for this Committee to authorize preconstruction activities is ***DENIED***.

II. CORRECTED APPENDIX A TO NOTICE OF EVIDENTIARY HEARING

PLEASE TAKE NOTICE of the attached **corrected and updated Appendix A** to the Los Esteros Notice of Evidentiary Hearing and Hearing Order, which was published on February 25, 2002.⁴

1. Monday, March 11, 2002 (top of the page under **TOPIC AND WITNESS SCHEDULE**) has been corrected to Friday, March 8, 2002.
2. Socioeconomics should have been included as an uncontested topic. It is shown on the attached corrected **Appendix A** as topic 10.
3. Project Description is the beginning of the contested topics and it is now shown on the corrected **Appendix A** as topic 11. Topics 11-22 are bolded to reflect that these topics are contested.
4. Visual Resources, now topic 22 with the addition of Socioeconomics, correctly shows the City of Milpitas and its witness, Gary Clay, as well as the Coalition conducting cross examination. Michael Clayton is Staff's sole witness. Thomas Priestly is Applicant's sole witness.

In addition, **Appendix A** has been updated to reflect other changes and additions to Staff and Applicant's presentation of witnesses. The parties should ensure that witness qualification statements are on file for all witnesses. No testimony will be taken from those witnesses who have not filed qualification statements.

III. COMMITTEE'S PRELIMINARY EXHIBIT LIST

PLEASE TAKE NOTICE of the attached **Tentative Exhibit List**. The parties are expected to file with the Committee updated Exhibit Lists prior to the presentation of testimony, based upon the order of presentation of evidence as set forth in **Appendix B** attached hereto.

⁴ In all other respects, the original Notice of Evidentiary Hearing and Hearing Order dated February 25, 2002 is correct.

IV. OTHER MATTERS

Except for Mr. Garbett, all parties shall make all filings electronically. The Public Adviser will arrange to have Mr. Garbett served with all filings in the most expeditious manner available. Mr. Garbett will not be relieved of the obligations of any Intervenor due to special circumstances surrounding his lack of a means to receive electronic filings.

Dated March 6, 2002 at Sacramento, California.

WILLIAM J. KEESE
Chairman and Presiding Member
Los Esteros AFC Committee

JAMES D. BOYD
Commissioner and Associate Member
Los Esteros AFC Committee

APPENDIX A

TOPIC AND WITNESS SCHEDULE

The Committee will hear topics according to the following agenda. Any requests for changes/substitutions must be made **no later than the party's filing of Friday, MARCH 8, 2002.**

March 11, 2002 ⁵	
TOPIC	WITNESS
1. Compliance Monitoring and Closure	Applicant: Todd Stewart, Jerry Salamy and Steve DeYoung Staff: Chris Huntley
2. Facility Design	Applicant: Todd Stewart and Gary Carr Staff: Steve Baker, Al McCuen, and Shabhab Khoshmashrab
3. Power Plant Reliability	Applicant: Todd Stewart Staff: Steve Baker
4. Transmission Line Safety & Nuisance	Applicant: David Solhtalab, Ali Amirali Staff: Obed Odoemelum
5. Noise	Applicant: Mark Bastasch Staff: Brewster Birdsall
6. Cultural Resources	Applicant: James Bard Staff: Robin Palmer and Gary Reinoehl
7. Geology and Paleontology	Applicant: Tom Lae and Lanny Fisk Staff: Patrick Pilling
8. Socioeconomics	Applicant: John Carrier Staff: Dan Gorfain City of Milpitas:

⁵ Topics may be continued to March 12 and 13, 2002, if necessary. Bolded Topics are those where issues are present requiring cross-examination. Unbolded Topics will be taken by way of sworn, written Declarations without an opportunity for further examination by agreement of the parties.

March 11, 2002⁵	
TOPIC	<u>WITNESS</u>
9. Waste Management	Applicant: Karen Parker Staff: Alvin Greenberg
10. Traffic & Transportation	Applicant: Jeanne Acutanza Staff: Matthew Darrow
11. Project Description	Applicant: Todd Stewart Staff: Robert Worl City of Milpitas:⁶ The Coalition: T.H.E. P.U.B.L.I.C.:
12. Power Plant Efficiency	Applicant: Todd Stewart Staff: Steve Baker The Coalition:
13. Soil & Water Resources	Applicant: Andrew Sloan, Charles Vosicka, and Dave Richardson Staff: Joe Crea, John Kessler and John Scoggs T.H.E. P.U.B.L.I.C.:
14. Air Quality	Applicant: Gary Rubenstein Staff: Gabriel Behymer City of Milpitas: The Coalition: T.H.E. P.U.B.L.I.C.:

⁶ Where no witness is listed by the party's name, the party has reserved only the right to cross-examine other party's witnesses unless the parties timely amend their Prehearing Conference Statements/Prefiled Testimony to list a witness.

March 11, 2002 ⁵	
TOPIC	<u>WITNESS</u>
15. Public Health	<p>Applicant: Gary Rubenstein, John Lowe</p> <p>Staff: Alvin Greenberg</p> <p>City of Milpitas:</p> <p>The Coalition:</p> <p>T.H.E. P.U.B.L.I.C.:</p>
16. Transmission System Engineering (Project Schedule)	<p>Applicant: David Solhtalab, Ali Amirali</p> <p>Staff: Mark Hesters, Al McCuen</p> <p>Cal-ISO: To Be Identified</p> <p>The Coalition:</p>
17. Project Alternatives	<p>Applicant: Jerry Salamy</p> <p>Staff: Robert Worl and Richard Ratliff</p> <p>City of Milpitas:</p> <p>The Coalition: William B. Marcus</p>
18. Hazardous Materials Management	<p>Applicant: Jerry Salamy</p> <p>Staff: Alvin Greenberg and Rick Tyler</p> <p>T.H.E. P.U.B.L.I.C.:</p>
19. Worker Safety & Fire Protection	<p>Applicant: Jerry Salamy</p> <p>Staff: Alvin Greenberg</p> <p>City of Milpitas:</p>
20. Biological Resources	<p>Applicant: E. J. Koford</p> <p>Staff: Julie Colyer and Natasha Nelson</p> <p>City of Milpitas:</p>

March 11, 2002 ⁵	
TOPIC	<u>WITNESS</u>
	<p>The Coalition:</p> <p>T.H.E. P.U.B.L.I.C:</p>
21. Land Use	<p>Applicant: Valerie Young</p> <p>Staff: Negar Vahidi</p> <p>City of Milpitas:</p>
22. Visual Resources	<p>Applicant: Thomas Priestly</p> <p>Staff: Michael Clayton</p> <p>City of Milpitas: Gary Clay</p> <p>The Coalition:</p>

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**APPENDIX B
TENTATIVE EXHIBIT LIST**

- Exhibit 1: Staff Analysis of Los Esteros Critical Energy Facility Project (LECEF) filed on December 31, 2001. Sponsored by _____; admitted into evidence on _____.
- Exhibit 1A: Supplement to Staff Analysis filed on February 5, 2002. Sponsored by _____; admitted into evidence on _____.
- Exhibit 2: Application for Certification document, Volumes I- (Text) and Volume II- , filed August 6, 2001; as supplemented by Applicant's. Sponsored by Applicant; received into evidence on March 11, 2002.
- Exhibit 2A: Final Determination of Compliance, by Bay Area Air Quality Management District, February 1, 2002. Sponsored by _____; admitted into evidence on _____.
- Exhibit 2B: PM 10 Mitigation Plan from Sierra Research/Matthews to Huntley/CEC dated January 29, 2002. Sponsored by _____; admitted into evidence on _____.
- Exhibit 2C: PM 10 Mitigation Plan from Sierra Research/Matthews to Worl/CEC dated January 29, 2002. Sponsored by _____; admitted into evidence on _____.
- Exhibit 2D: Data Request Response Set #1F, filed with the Energy Commission on December 28, 2002. Sponsored by _____; admitted into evidence on _____.
- Exhibit 2E: SCR Design - Supplemental Information, filed with the Energy Commission on December 24, 2001. Sponsored by _____; admitted into evidence on _____.
- Exhibit 2F: Data Request Responses Set 1E, filed with the Energy Commission on December 21, 2001. Sponsored by _____; admitted into evidence on _____.